A

LIONG SEOW KENG & ORS v. HO SOON CHENG

HIGH COURT MALAYA, KUALA LUMPUR
S NANTHA BALAN J
[ORIGINATING SUMMONS NO: 24NCVC-646-05-2014]
4 MAY 2016

B

SUCCESSION: *Will – Administration of estate – Beneficiaries of will obtained order that trust for sale and conversion of properties in residuary estate be terminated and transferred in specie to beneficiaries instead of being sold – Trustee sought to obtain stay of order and applied for forensic handwriting to be conducted to*
C *determine genuineness of will – Whether there was inordinate delay on trustee's part in applying for stay of proceedings – Whether trustee sought to obtain stay order under two separate applications contradictory to each other – "approbating and reprobating" – Whether beneficiaries suffered extreme prejudice by trustee's reluctance to distribute assets – Balance of justice – Whether lay in favour of*
D *beneficiaries – Whether unjust, oppressive and unfair to beneficiaries if distribution withheld*

TRUSTS: *Trustee – Will – Administration of justice – Beneficiaries of will obtained order that trust for sale and conversion of properties in residuary estate be terminated and transferred in specie to beneficiaries instead of being sold – Trustee*
E *sought to obtain stay of order and applied for forensic handwriting to be conducted to determine genuineness of will – Whether there was inordinate delay on trustee's part in applying for stay of proceedings – Whether trustee sought to obtain stay order under two separate applications contradictory to each other – "approbating and reprobating" – Whether beneficiaries suffered extreme prejudice by trustee's*
F *reluctance to distribute assets – Balance of justice – Whether lay in favour of beneficiaries – Whether unjust, oppressive and unfair to beneficiaries if distribution withheld*

CIVIL PROCEDURE: *Stay of proceedings – Will – Administration of estate – Beneficiaries of will obtained order that trust for sale and conversion of properties in*
G *residuary estate be terminated and transferred in specie to beneficiaries instead of being sold – Trustee sought to obtain stay of order and applied for forensic handwriting to be conducted to determine genuineness of will – Whether there was inordinate delay on trustee's part in applying for stay of proceedings – Whether trustee sought to obtain stay order under two separate applications contradictory to*
H *each other – "approbating and reprobating" – Whether beneficiaries suffered extreme prejudice by trustee's reluctance to distribute assets – Balance of justice – Whether lay in favour of beneficiaries – Whether unjust, oppressive and unfair to beneficiaries if distribution withheld*

I The plaintiffs were the beneficiaries under the last will and testament of the deceased ('the will'). The first plaintiff was the widow of the deceased and the second to fourth plaintiffs were the sons of the deceased. The defendant was named as the sole trustee and executor under the will. The deceased died

on 10 October 2012. The defendant filed an application for grant of probate ('the probate OS') which was given on 5 March 2013. However, for a variety of reasons, the relationship between the plaintiffs and the defendant became acrimonious and bitter. The plaintiffs applied to the court by way of the present originating summons ('the KLOS') for, *inter alia*, an order that the trust for sale and conversion of the real and personal properties in the residuary estate be terminated and for the same to be transferred *in specie* to the beneficiaries instead of being sold. On 11 September 2014, the Judicial Commissioner ('JC') granted order in terms of the KLOS. Enclosure 26 was an application by the plaintiff under O. 45 r. 6(2) and 6(3) of the Rules of Court 2012, s. 25(2) and para. 16 of the Schedule to the Courts of Judicature Act 1964 and/or the inherent jurisdiction of the court under O. 92 r. 4 of the Rules of Court 2012 to compel the defendant to comply with the said order dated 11 September 2014. By way of encl. 29, the defendant sought to obtain a stay of the order dated 11 September 2014 pending disposal of the appeal to the Court of Appeal. In the meanwhile, the defendant alleged that a certain 'claimant' had come forward to say that the deceased had promised to give him a 'gift' and that the absence of a 'gift' in the will in favour of the so-called claimant had cast doubt on the genuineness of the signature of the deceased in the will. As such, the defendant was of the view that it was necessary for a forensic handwriting examination to be conducted to determine the genuineness of the will. Further, the defendant submitted that the distribution of assets should not take place as one quarter of the estate would go to the mother of the deceased in intestacy. The defendant duly filed an application in the probate OS by way of encl. 12 and obtained an *ex parte* order ('the *ex parte* order') by which the High Court ordered that there be a forensic handwriting examination of the will. The plaintiffs, however, succeeded in its application to intervene in the probate OS in order to set aside the *ex parte* order. The defendant and the plaintiffs were thus locked in a dispute as to the fate of encl. 12. The plaintiffs contended that the application for forensic examination had been 'spent' as the *ex parte* order had been set aside while the defendant maintained otherwise and contended that the application was very much alive. The defendant applied *via* encl. 35 for an application to stay the present proceedings until the results of the document examination in the probate OS were disposed of. The critical issue herein was whether the proceedings in the KLOS should be held in abeyance and for the *status quo* to be maintained pending disposal of the defendant's appeal in the court of appeal and/or pending disposal of the ongoing dispute in the probate OS in relation to whether encl. 12 was spent or was still alive or pending disposal of encl. 12 and/or pending the outcome of any court ordered handwriting analysis.

A B C D E F G H I

Held (allowing encl. 26 with costs; dismissing encls. 29 and 35 with costs):

(1) The grant of probate itself was given by the court on 5 March 2013. The defendant did not have any queries or reason to suspect that anything was amiss in relation to the signature of the deceased when he applied for grant of probate. The premise on which the defendant now sought to ascertain the genuineness of the signature of the deceased appearing in the will was that he had received 'information' from a 'claimant'. It was significant that the defendant had chosen not to identify the so-called claimant. Further, even if the mother of the deceased was alive when the deceased passed away, then it was for her or her estate to make a claim in intestacy and in order to do that, she or her estate would have to set aside the grant of probate by impugning the will. But at present, the estate of the deceased's mother had not stepped forward and there was no such application by the estate of the late mother of the deceased. The order of this court dated 11 September 2014 and the grant of probate dated 5 March 2013 had not been set aside. As such, both these orders were very much extant and were enforceable. The suggestion that there may be a claim by a so called 'claimant' or that the estate of the late mother of the deceased may have a share in intestacy were just too speculative as there was presently no intestacy. (paras 32-38)

(2) There was an inordinate delay on the part of the defendant in making the application for stay of proceedings (encl. 35) pending a so-called forensic examination. Enclosure 12 in the probate OS was itself filed on 24 August 2015 *ie* about 17 months after the grant of probate was given. Apart from this, the defendant had also filed encl. 29 to stay the order dated 11 September 2014 pending disposal of the defendant's appeal to the court of appeal which in turn was predicated on the genuineness of the will. As such, the defendant was obviously having more than one bite of the proverbial 'cherry' and sought to obtain a stay under two separate applications which were somewhat contradictory to each other in terms of whether the will was regarded as genuine or invalid. The defendant was 'approbating and reprobating'. (paras 39, 40 & 43)

(3) Taking all of the above events and the conduct of the defendant into consideration, the only plausible conclusion was that the defendant was not prepared to distribute the assets of the deceased and was minded to take every possible step to delay the implementation of the order of the court in the KLOS dated 11 September 2014. The grant of probate dated 5 March 2013 was still valid and had not been set aside; similarly the order dated 11 September 2014 granted in the KLOS was still valid and was enforceable. Presently, there was no certainty as to the outcome of the dispute that was ongoing in the probate OS particularly as to the fate of encl. 12. As such, it was a matter of pure speculation and conjecture that an order would be made for forensic examination of the will and/

or that the will may be set aside as being a forgery and/or the grant of probate dated 5 March 2013 would be set aside. All of this including the issue of intestacy belong presently to the realm of speculation and remained very much 'afloat in a sea of uncertainty'. (paras 53 & 54)

(4) The plaintiffs, particularly the second and fourth plaintiffs, who were the lawful sons of the deceased, were suffering extreme prejudice as they were being deprived of their just share of the assets of the deceased's estate *ie* their late father. The defendant had no interest as such in the assets of the estate of the deceased and his duty was only to act in accordance with the terms of the will. As such, to allow the defendant to leave the distribution of the assets of the state of the deceased in prolonged suspended animation whilst he pursued his speculative venture impugning the signature of the deceased in the will was oppressive and unjust to say the least. The balance of justice therefore lay clearly in favour of the beneficiaries of the estate of the deceased as per the will. In the present circumstances, it would be unjust, oppressive and plainly unfair to the beneficiaries if distribution was withheld or delayed any further. (paras 55, 56 & 60)

Case(s) referred to:
Cowan and Others v. Scargill and Others [1985] 1 Ch 270 ***(refd)***
In Re Beddoe Downes v. Cottam [1893] 1 Ch 547 ***(refd)***
In Re Smith & Fawcett Ltd [1942] Ch 304 ***(refd)***
Jagdis Singh Banta Singh v. Outlet Rank (M) Sdn Bhd [2013] 3 CLJ 47 CA ***(refd)***
Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd [2003] 4 CLJ 1 FC ***(refd)***
Ligar Fernandez v. Eric Claude Cooke [2002] 6 CLJ 152 HC ***(refd)***
Lee Yoke San & Anor v. Tsong Sai Sai Cecilia & Anor [1993] 1 SLR 602 ***(refd)***
Liong Seow Keng & Ors v. Ho Soon Cheng [2015] 3 CLJ 808 HC ***(refd)***
Re H Somapah, Deceased [1941] 1 LNS 67 HC ***(refd)***
Tan Soo Lock v. Tan Jiak Choo & Anor [1930] 1 LNS 8 HC ***(refd)***
Turner v. Hancock (1882) 20 Ch D 303 ***(refd)***
Universal Trustee (Malaysia) Bhd v. Lambang Pertama Sdn Bhd & Anor [2014] 1 LNS 797 HC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, Schedule para. 16
Distribution Act 1958, s. 6(1)(g)
Rules of Court 2012, O. 45 r. 6(2), (3), O. 92 r. 4

Other source(s) referred to:
Halsbury's Laws of England, vol 17, 4th edn, para 918

For the plaintiffs - Harmeet Singh & Chan Mun Fei; M/s Raja Eleena Siew Ang & Assocs
For the defendant - Raymond Mah & Choo Mun Wei; M/s Mah Weng Kwai & Assocs

Reported by Suhainah Wahiduddin

A

JUDGMENT

S Nantha Balan J:

Introduction

B **[1]** These are my grounds of judgment in respect of three applications namely encls. 26, 29 and 35. Enclosure 26 is an application by the plaintiffs to compel the defendant to comply with the order of this court dated 11 September 2014. Enclosures 29 and 35 were filed by the defendant. Enclosure 29 is an application for stay pending appeal against the order dated 11 September 2014. Enclosure 35 is an application for stay of proceedings C pending the forensic handwriting examination of the last will and testament of the deceased, which is the subject matter of the present proceedings.

Background

[2] The plaintiffs are the beneficiaries under the last will and testament of D Quah Chin Cheng ("the deceased") dated 17 September 2012 ("the will"). The first plaintiff is the widow of the deceased, the second to fourth plaintiffs are the sons of the deceased. The defendant was named as the sole trustee and executor under the will. The deceased died on 10 October 2012. The defendant filed an application for grant of probate by way of Penang High E Court Originating Summons No. 32NCVC-10-01-2013 ("the probate OS"). The grant of probate was given on 5 March 2013 and issued on 19 March 2013.

[3] Under cl. 8 of the will, the first plaintiff was given a sum of RM5,000,000 as a gift. Pursuant to cl. 5 of the will, one property was F specifically bequeathed to the second to fourth defendants in the proportion of one third share each. Pursuant to cl. 9 of the will, the residuary estate was bequeathed to the second to fourth plaintiff by way of a trust for sale.

[4] For present purposes, it would suffice to say that for a variety of reasons, the relationship between the plaintiffs and the defendant became G acrimonious and bitter. The plaintiffs applied to the court by way of the present Originating Summons which was filed on 2 May 2014 ("the KLOS") for, *inter alia*, an order that the trust for sale and conversion of the real and personal properties in the residuary estate be terminated and for the same to be transferred *in specie* to the beneficiaries instead of being sold.

H

Termination Of The Trust For Sale

[5] On 11 September 2014, the learned Judicial Commissioner granted order in terms of the KLOS and terminated the trust for sale and conversion and ordered the real and personal properties in the residuary estate of the deceased to be transferred to the second to fourth plaintiffs as beneficiaries I under the will. The grounds of judgment of the learned Judicial Commissioner has been reported as *Liong Seow Keng v. Ho Soon Cheng* [2014] 6 AMR 608.

[6] The order dated 11 September 2014 reads as follows:

(i) bahawa amanah untuk dijual dan penukaran ("trust for sale and conversion") yang diisytiharkan oleh Quah Chin Cheng, si mati (selepas ini dikenali sebagai "Pewasiat tersebut"), di bawah klausa 9 diwasiatnya yang bertarikh 17 September 2012 (selepas ini dirujuk sebagai "Wasiat tersebut") ditamatkan dan segala harta-harta alih dan tak alih yang dipegang di bawah ini ("thereunder") oleh Defendan dipindah milik kepada Plaintif Ke-2. Plaintif Ke-3 dan Plaintif Ke-4 dalam bahagian-bahagian yang sama rata;

(ii) Bahawa akaun-akaun penuh dan teratur untuk Harta Pusaka tersebut dibekalkan oleh Defendan kepada Plaintif-plaintif dan/atau peguam cara plaintif-plaintif dalam 7 hari dari tarikh perintah Mahkamah Yang Mulia ini iaitu 7 hari dari 11 September 2014;

(iii) Bahawa Defendan dihalang daripada melantik dirinya dan seorang bernama LIM BIAN CHAI (NRIC NO: 660806-07-5049) (selepas ini dikenali sebagai "Lim Bian Chai" sebagai pengarah-pengarah Cosyland (M) Sdn Bhd (No. Syarikat: 565945-T) (selepas ini dikenali sebagai "Cosyland") dengan melaksanakan kuasa pengundian yang diperolehi daripada 249,999 saham-saham biasa yang dmiliki oleh Harta Pusaka tersebut di dalam Cosyland ("selepas ini dirujuk sebagai Saham-saham Cosyland tersebut");

(iv) Bahawa Defendan dihalang daripada melaksanakan kuasa pengundian yang diperolehi daripada saham-saham Cosyland tersebut untuk mengundi bertentangan dengan periantikan semula Plaintif Ke-3 sebagai Pengarah Cosyland.

(v) Bahawa Defendan dihalang daripada menjual bakian harta pusaka Pewasiat tersebut atau mana-mana bahagian daripadanya;

(vi) Tiada perintah untuk kos.

The Appeal

[7] On 10 October 2014, the defendant filed a Notice of Appeal to Court of Appeal and the appeal has been registered as W-02(NCVC)(A)-1777-10-2014 ("the appeal"). To-date, the appeal has not been disposed of and the status presently is that it is fixed for case management before the Registrar of the Court of Appeal on 13 May 2016.

The Application To Compel The Defendant

[8] Enclosure 26 is an application by the plaintiff under O. 45 r. 6(2) and 6(3) of the Rules of Court 2012, s. 25(2) and para. 16 of the Schedule to the Courts of Judicature Act 1964 and/or the inherent jurisdiction of the court under O. 92 r. 4 of the Rules of Court 2012 to compel the defendant to comply with the order dated 11 September 2014.

[9] The order of the court on 11 September 2014 was essentially an order, *inter alia*, that the trust for sale and conversion stipulated in the will, be terminated and that the real and personal properties in the residuary estate of the deceased be immediately transferred *in specie* (in their present form) to the second to fourth plaintiffs as beneficiaries instead of being sold.

The Application For Stay Pending Appeal

[10] By way of encl. 29, which was filed on 14 August 2015, the defendant seeks to obtain a stay of the order dated 11 September 2014 pending disposal of the appeal to the Court of Appeal. Briefly stated the defendant's grounds in moving the court for a stay pending appeal are as follows:

1. There are special circumstances that warrant a stay of the Order dated 11 September 2014 pending the disposal of the Defendant's appeal to the Court of Appeal *vide* Civil Appeal No. W-02(NCVC)(A)-1777-10/2014 ("Appeal").
2. The Estate consists of various assets totalling approximately RM150 million in value.
3. The Defendant is appealing against, among others, the order terminating the trust for sale and conversion created in the last will and testament ("Will") of Quah Chin Cheng, deceased ("Testator") and the order that all real and personal properties of the Estate be transferred to the 2nd, 3rd and 4th Plaintiffs in equal shares.
4. In compliance with the Order dated 11 September 2014, the Defendant has refrained from selling any of the assets of the Estate for the purpose of maintaining the status quo pending the Appeal. The Defendant has also refrained from distributing the assets of the Estate to the 2nd, 3rd and 4th Plaintiffs in order to maintain the *status quo* pending the Appeal.
5. The Appeal will be rendered nugatory in the event the assets of the Estate are transferred to the 2nd, 3rd and 4th Plaintiffs before the hearing of the Appeal. By such time the Estate would have been fully administered and, in the event the Appeal is allowed, there will no longer be any assets in the Estate for the Defendant to administer in accordance with the terms of the Will.

Doubts About The Signature Of The Deceased

[11] In the meanwhile, certain developments have taken place in the probate OS. The defendant has alleged that a certain "claimant" has come forward to say that the deceased had promised to give him a "gift" and that the absence of a "gift" in the will in favour of the so-called claimant has cast doubt on the genuineness of the signature of the deceased in the will. The defendant says that after he had been apprised of this information he

compared the signature of the deceased in the will with other documents and found that there are differences. As such, the defendant is of the view that it is necessary for a forensic handwriting examination to be conducted to determine the genuineness of the will

The Ex-parte Order In The Probate OS

[12] Consequently, the defendant asserts that there are doubts about the deceased's signature in the will and has sought to obtain an order for a forensic handwriting examination to be conducted so as to determine the authenticity and genuineness of the signature of the deceased appearing in the will. The defendant duly filed an application in the probate OS by way of encl. 12 and obtained an *ex parte* order dated 5 October 2015 ("the *ex parte* order") by which the Penang High Court ordered that there be a forensic handwriting examination of the will.

[13] In the course of case management in the present proceedings, the plaintiffs came to know of the *ex parte* order and they promptly applied to intervene in the probate OS in order to set it aside. The plaintiffs successfully intervened in the probate OS, On 22 March 2016, the learned Judicial Commissioner of the Penang High Court ruled in favour of the present plaintiffs and set aside the *ex parte* order. The specific grounds on which the *ex parte* order was set aside is not known as I have not seen the grounds of judgment. At the last hearing date, I directed parties to send a copy of the grounds of judgment to this court, in the event it becomes available before delivery of the court's decision on the applications that are presently pending before me.

[14] The present status of the matter in the probate OS is that the parties ie, the defendant herein and the plaintiffs (as interveners) are locked in a dispute as to the fate of encl. 12. The plaintiffs' contend that the application for forensic examination (encl. 12 in the probate OS) has been "spent" as the *ex parte* order has been set aside. However, the Defendant maintains otherwise and contends that the application is very much alive. The learned Judicial Commissioner of Penang High Court has directed parties to submit on this issue and it remains to be seen whether encl. 12 in the probate OS is still alive or has been spent. In any event, it now appears that encl. 12 has been fixed for "*inter pastes*" hearing.

[15] I was also informed by the parties that the learned Judicial Commissioner had ordered the defendant to pay a sum of RM25,000 as costs "personally" (not out of the assets of the estate of the deceased) in respect of the *ex parte* order that was set aside. The plaintiffs interpret this to mean that encl. 12 was a frivolous application, whereas the defendant states that there is no finding by the Penang High Court that it was a frivolous application.

A **Stay Pending Forensic Examination Of The Will**

[16] I now turn to deal with encl. 35 which is the defendant's application to stay the present proceedings until the results of the document examination in the probate OS are disposed of. This is of course on the assumption that encl. 12 is still valid and is alive. As I said, encl. 12 in the probate OS has
B been fixed for *inter partes* hearing but counsel for the plaintiffs has informed me that he will be taking up the requisite objections when the matter comes up. For now, I will just leave it at that.

[17] Enclosure 35 is made under O. 92 r. 4 of the Rules of Court 2012 and/
C or under the inherent jurisdiction of the court. The order that is sought in encl. 35 is that, "all further proceedings in this action be stayed until the disposal of the defendant's application dated 24 August 2015 filed under Penang High Court Originating Summons No. 32NCVC-10-01-2013 (Penang HC Application), and in the event the Penang HC Application is allowed, until the results of the document examination ('document examination') of
D the last will and testament dated 17 September 2012 ("Will") of Quah Chin Cheng, deceased ("Testator") are obtained from the Department of Chemistry, Ministry of Science, Technology and Information Malaysia ("Department of Chemistry")."

E **[18]** Briefly stated the grounds on which the defendant moves this court for a stay of proceedings under encl. 35 are as follows:

1. In the Penang HC Application, the Defendant is asking for the Will to be taken from the registry of the Penang High Court for the Document Examination to ascertain whether the signature thereon is the Testator's signature or is a forgery.

F

2. The proceedings before this Court include the Plaintiffs' application dated 10 July 2015 ("Plaintiffs' Application to Execute") which seeks, among other things, an order that the Defendant transfer all moveable and immoveable properties of the Estate to the 2nd, 3rd and 4th Plaintiffs within 14 days ("Paragraph (1) of the Order dated
G 11 September 2014").

3. Distribution of the residuary Estate pursuant to Paragraph (i) of the Order dated 11 September 2014 is premised on the 2nd, 3rd and 4th Plaintiffs' entitlement to the Estate based on the Will. If the signature on the Will is found to be forged and the Will is rendered
H a nullity, the 2nd, 3rd and 4th Plaintiffs would no longer be so entitled.

4. There are special circumstances that warrant a stay of the proceedings herein including the Plaintiffs' Application to Execute, pending the determination of the Penang HC Application and the Document Examination.

I

5. The Penang HC Application and the Document Examination would be rendered nugatory and academic if the proceedings in this Honourable Court are not stayed and the Defendant is compelled to forthwith distribute the properties in the Estate to the Plaintiffs.

Stay of Proceedings - The Law

[19] It is a well-established principle that an order to stay court proceedings can only be granted if it is established by the party seeking a stay that there are special circumstances justifying the stay. The principle may be gathered from the seminal case of *Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd* [2003] 4 CLJ 1; [2004] 1 MLJ 257 where the Federal Court said:

> [9] The need to establish the existence of special circumstances to enable the court to grant a stay of execution has been well-established in this country.
>
> [12] ... there must be **'strong justification'** for a party to come within an exception to a general rule.
>
> (emphasis added)

[20] Mote recently, the Court of Appeal in *Jagdis Singh Banta Singh v. Outlet Rank (M) Sdn Bhd* [2013] 3 CLJ 47; [2013] 4 MLJ 213 re-stated and reformulated the principles for stay of proceedings as follows:

> [22] ...
>
> (b) An unsuccessful party applying for a stay must show "special circumstances". What will constitute "special circumstances" will no doubt vary from case to case. The fact that an appeal would be rendered nugatory if stay was refused is the most common one. (See *Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd* [2003] 4 CLJ 1 ... The application is not granted as a matter of routine and it is not an automatic or mechanical relief slavishly followed after filing an appeal. In every matter or suit before a court of law, whether in its original or appellate stage of proceedings, the court will consider the competing rights of both parties including the applicant and respondent to justice.
>
> (c) There is a need to preserve the res or preservation of the subject matter of litigation. The courts have an obligation to protect the res for the purpose of ensuring that the appeal, if successful, will not be rendered nugatory. (See *Erinford Properties Ltd v. Cheshire County Council* [1974] 2 WLR 749). But where it is shown by affidavit evidence, say by the respondent, that the *res* will not be destroyed or there is in fact no *res*, an application may not be granted.
>
> (d) Where an application is an abuse of the court process, then the stay of proceedings will not be granted. A typical example of abuse of court process is where a suit is duplicated or where a party employs improper and perverse procedure to obtain an advantage undeservedly.
>
> (e) It is important to stress that initiation of a suit in a court of law demands the suit will be heard expeditiously and completed without any inhibition midway. Therefore, where an application for stay of proceedings is intended to merely stop or suspend the proceedings;

A

> it will be refused. Some applicants, on seeing the weakness of their client's case, would resort to application for stay and thereby waste the time of the other party and the court. The party simply cannot resort to the interlocutory of stay proceedings on having the slightest disagreement with any ruling of a trial judge. Courts are enjoined not to encourage such unwholesome practice.

B

> (f) An applicant for stay of proceedings must come with clean hands because what he is asking is an equitable relief. Equity will not assist the unclean. That is why the court has to look into the antecedents of the parties.

C

(emphasis added)

[21] Further, in *Universal Trustee (Malaysia) Bhd v. Lambang Pertama Sdn Bhd & Anor* [2014] 1 LNS 797; [2015] 7 MLJ 305 the High Court held that when dealing with an application for stay of proceedings the court should consider, *inter alia*, the balance of justice and prejudice:

D

> 23. In deciding whether proceedings can be stayed pending the disposal of an appeal, the following factors should be considered:
>
> (b) in *Chinese Chamber Realty Pte Ltd & Ors v. Samsung Corp (No 2)* [2003] 4 SLR 313, at para. 3, the Singapore High Court considered *the balance of convenience (now popularly known as balance of justice), namely*
>
E
>
> *a comparison of the existence, nature and extent of prejudice which may be suffered by the parties if proceedings are stayed or otherwise*;
>
> (d) whether there is an unexplained delay in applying for a stay of proceedings.
>
> (emphasis added)

F

The Arguments

[22] In opposing encl. 35, it was argued for the plaintiffs that the defendant's application in the probate OS to take the will and subject the same to document examination of the deceased's signature does not amount
G
to a special circumstance which justifies a stay of the proceedings before this court.

[23] According to counsel for the plaintiff, nothing will be rendered nugatory in the probate OS because the *ex parte* order has been set aside and presently there is no basis to set aside the grant of probate dated 5 March
H
2013 which remains valid and in force, On that analysis, counsel for the plaintiffs argues that there is no change in the circumstances in the probate OS.

[24] Additionally, counsel for the plaintiffs argues that this court had also granted a valid order dated 11 September 2014 in the KLOS the effect which
I
is that the trust for sale under the will has been terminated and the deceased's assets are to be distributed to the Second, Third and Fourth plaintiffs equally. It was emphasised that the plaintiffs in the KLOS, including the widow of

the deceased are vigorously opposing any attempt by the defendant to delay distribution of the assets of the deceased. According to the plaintiffs, the defendant's application for stay, namely encls. 29 and 35 are a manifestation of delaying tactics on the defendant's part. Further, it is alleged that the two applications for stay by the defendant are contradictory to each other.

[25] The plaintiffs maintain that the defendant does not have any interest in the deceased's assets and the assets would ultimately have to be transferred to the second, third and fourth plaintiffs whether in specie or in the form of proceeds of the sale of the deceased's estate. It was emphasised that the defendant did not raise any issue about the alleged discrepancy of the deceased's signature in his will when he applied for the grant of probate or in encl. 29 (application for stay pending appeal) when it was filed on 13 August 2015.

[26] In terms of time-lines, it was pointed out that when encl. 29 was filed, the defendant had already been approached by the so-called "claimant" and had conducted a comparison of the signature. Hence, it was contended that the defendant quite perplexingly only raised this issue in encl. 35 which was separately filed as late as 25 September 2015, after encls. 26 and 29 had been fixed for hearing during the case management on 27 August 2015. Hence, the plaintiffs' maintain that if there was a genuine reason to dispute the will, the defendant ought to have raised this in encl. 29, and not by filing a second application for stay.

[27] In the circumstances, the plaintiffs allege that the issue about the alleged discrepancy of the deceased's signature, the application in the probate OS (encl. 12) and encl. 35 herein are collectively a clear afterthought and raised by the defendant merely to delay the proceedings before this court and specifically to delay the distribution of the deceased's assets.

[28] In terms of the imperative duties of the defendant, it was submitted that pursuant to the grant of probate dated 5 March 2013 and the appointment of the defendant as the executor of the deceased's estate, the defendant's duty is to administer the deceased's property and carry into effect the provisions of the will. Counsel argued that in doing so, it is the defendant's duty to exercise his powers in the best interest of the plaintiffs as the beneficiaries of the deceased's assets. (See: *Cowan and Others v. Scargill and Others* [1985] 1 Ch 270; *Lagar Fernandez v. Eric Claude Cooke* [2002] 6 CLJ 152; *Lee Yoke San & Anor v. Tsong Sai Sai Cecilia Anor* [1993] 1 SLR 602).

[29] As such, the plaintiffs maintain rather vehemently that instead of carrying out his duties as executor, the defendant had embarked on a frolic of his own to question the authenticity of the will. By so applying (encl. 12) in the probate OS to remove and examine the will, the defendant has acted contrary to his duties and beyond his jurisdiction as an executor.

[30] To the extent that the defendant contends that there may be third party claims against the estate of the deceased, the plaintiffs contend that if at all there are any claims by any third-party against the deceased's estate, which is denied, the onus is on that interested party to make the appropriate claim against the deceased's estate. It was submitted that it was for the interested parties to impugn the will and that it is contrary to the defendant's duties as an executor to impugn the will.

Analysis And Conclusion

[31] Having regard to the chronology of events as set out above, the critical issue before me is whether the proceedings in the KLOS should be held in abeyance and for the *status quo* to be maintained pending disposal of the defendant's appeal in the Court of Appeal and/or pending disposal of the ongoing dispute in the probate OS in relation to whether encl. 12 is spent or is still alive or pending disposal of encl. 12 and/or pending the outcome of any court ordered handwriting analysis.

[32] Presently, the status is that there is as yet, no order for any forensic examination of the will. It is rather significant that the defendant did not have any queries or reason to suspect that anything was amiss in relation to the signature of the deceased when he applied for grant of probate. The grant of probate itself was given by the court on 5 March 2013.

[33] Thus, the premise on which the defendant now seeks to ascertain the genuineness of the signature of the deceased appearing in the will is that he has received "information" from a "claimant" which leads him to suspect that it may not be the genuine signature of the deceased. It is to my mind significant that the defendant has chosen not to identify the so-called claimant.

[34] In this regard, the defendant says that the identity of the so-called claimant is not important, I am not sure why the defendant chooses to be rather secretive about the identity of the so-called "claimant". The plaintiffs' speculate that there is no such claimant. They may be right. But I cannot say one way or the other, whether there is such a claimant.

[35] In any event, the defendant argues that if the will is impugned on the basis that the signature of the deceased is not genuine then the estate will fall into intestacy and the beneficiaries will receive their share of the estate in accordance with the rules of distribution as provided for under s. 6(1)(g) of the Distribution Act 1958. In this regard, it is important to bear in mind that the beneficiaries of the estate of the deceased are the plaintiffs in the KLOS and they are averse to any effort by the defendant to impugn the signature of the deceased in the will which will delay the distribution of assets of the estate of the deceased.

[36] In his submissions, counsel for the defendant said that distribution of assets should not take place as one quarter of the estate will go to the mother of the deceased in intestacy. But, I find that there is nothing in the Defendant's affidavit about the entitlement of the deceased's mother in intestacy and as to whether she was/is even alive. But I do recollect that it was mentioned by counsel during oral submission that the mother of the deceased was alive when the deceased died and that she passed away subsequently.

[37] At any rate, even if the mother of the deceased was alive when the deceased passed away, then it is for her or her estate to make a claim in intestacy and in order to do that, she or her estate would have to set aside the grant of probate by impugning the will. But at present, the estate of the deceased's mother has not stepped forward and there is no such application by the estate of the late mother of the deceased and the grant of probate remains valid.

[38] As was rightly pointed out and emphasised very trenchantly by counsel for the plaintiffs, the order of this court dated 11 September 2014 has not to-date been set aside. More significantly, the grant of probate dated 5 March 2013 has also not been set aside to-date. As such, both these orders are very much extant and are enforceable. The suggestion that there may be a claim by a so-called "claimant" or that the estate of the late mother of the deceased may have a share in intestacy are just too speculative as there is presently no intestacy.

[39] I find that there has been an inordinate delay on the part of the defendant in making the application for stay of proceedings (encl. 35) pending a so-called forensic examination. In this regard, it is important to note that encl. 12 in the probate OS was itself filed on 24 August 2015 ie, about 17 months after the grant of probate was given.

[40] It may be recalled that apart from encl. 35, the defendant has also filed encl. 29 to stay the order dated 11 September 2014 pending disposal of the defendant's appeal to the Court of Appeal which in turn is predicated on the genuineness of the will. As such, the defendant is obviously having more than one bite of the proverbial "cherry" and seeks to obtain a stay under two separate applications which are somewhat contradictory to each other in terms of whether the will is regarded as genuine or invalid.

[41] In considering the application for stay under encl. 35, I had to bear in mind that one of the important criteria for the exercise of the court's discretion is that the subject matter of the stay of proceedings should not be rendered nugatory. The question is always, whether the subject matter would be rendered nugatory if the appeal is allowed or if some other event were to eventuate. This is where I had great difficulty in reconciling the defendant's stand.

[42] As I said earlier, on the one hand, the defendant is prosecuting his application for stay pending appeal (encl. 29), which is predicated on the will being genuine and valid, whereas on the other hand the defendant is asking for stay pending the determination of a handwriting analysis of the deceased's signature (encl. 35) on the premise that the signature of the deceased is or may not be genuine.

[43] This demonstrates to me quite clearly that the defendant is "approbating and reprobating". I will make no comment about the merits of encl. 12 which is being debated in the probate OS. I also make no comment about the *ex parte* order and the criticism that has been made about the manner in which the *ex parte* order was obtained. All of those matters are for the learned Judicial Commissioner of the Penang High Court to deal with and decide. It is fair to say that the learned Judicial Commissioner has already dealt with some aspects of the *ex parte* order and has set it aside. But since I have not seen his grounds of judgment, I will not say anything which may not be reflective of his reasoning. But an award of costs of RM25,000 to be paid "personally" by the defendant is indeed quite telling. This brings me to another point.

[44] On 30 March 2016, when parties appeared before me, I directed parties to forward only the learned judicial commissioner's grounds of judgment in respect of his decision dated 22 March 2016. I specifically directed that there shall be no further affidavits by any party. But, contrary to my directive, the defendant has unilaterally filed an affidavit (encl. 53) affirmed on 28 April 2016 annexing a preliminary handwriting report by one William Pang who gave an opinion that questions the validity of the deceased's signature on the will. I must say quite emphatically that this affidavit (encl. 53) was filed by the defendant in violation of the court's express directive that there shall be no further affidavit.

[45] As such, I have no hesitation in rejecting it. But, it is obvious that the defendant has gone to great lengths to secure the services of William Pang in order to impugn the genuineness of the deceased's signature on the will. I find this to be quite odd. If the will falls then the defendant's appointment as executor also falls.

[46] I also find it odd that the defendant is taking active steps to impugn the will even though the question as to whether he is entitled to subject the will to forensic analysis is still pending in the probate OS.

[47] I will leave open the question as to whether the defendant as executor under the will has the *locus standi* to take any such steps to impugn the will, especially after he had himself applied for and obtained the grant of probate. Those are pre-eminent questions for the Penang High Court to decide in the Probate OS.

[48] But for present purposes, it is I think relevant to have regard to the fact that in a letter dated 5 May 2015, the defendant's solicitors (exh. QDY5 encl. 49) wrote to the plaintiffs' solicitors and informed them that a person described as a "claimant" had approached the defendant and informed the latter that the deceased had promised a monetary gift and enquired whether the "gift" was included in the will. In that letter the defendant had asserted that the so-called claimant "firmly believed" that the deceased would have honoured his promise and that the absence of the gift in the will had caused the claimant to question the authenticity of the will.

[49] The defendant thereafter took the position that he would withhold distribution of the assets. In response, the plaintiffs' solicitor sent a letter dated 11 June 2015 doubting the existence of such a claimant and insisted that the defendant do distribute the assets in accordance with the order dated 11 September 2014 (see: exh. QDY7 encl. 49).

[50] The defendant's response through his solicitors' letter dated 11 June 2015 (exh. QDY6 encl. 49) was, *inter alia*, that, "The issue now is not the identity of the claimant but the authenticity of the Testator's signature on the Will". Quite obviously, the defendant was not prepared to disclose the identity of the so-called claimant to the plaintiffs.

[51] On 10 July 2015 the plaintiffs filed encl. 26. On 14 August 2015 encl. 29 was filed by the defendant, seeking a stay of the order dated 11 September 2014 pending the appeal to the Court of Appeal. On 24 August 2015, the defendant filed encl. 12 in the probate OS.

[52] On 25 September 2015, the defendant filed encl. 35 seeking a stay of proceedings in the present OS pending the disposal of the defendant's application dated 24 August 2015 filed in the probate OS and in the event the application is allowed, then that there be a stay until the results of the forensic examination of the will are obtained from the Department of Chemistry.

[53] In my view, taking all the above events and the conduct of the defendant into consideration, the only plausible conclusion that I could arrive at with regards to the defendant's conduct is that he is not prepared to distribute the assets of the deceased and is minded to take every possible step to delay the implementation of the order of the court in the KILOS dated 11 September 2014.

[54] It is clear that the grant of probate dated 5 March 2013 is still valid and has not been set aside. Similarly the order dated 11 September 2014 granted in the KLOS is still valid and is enforceable. Presently, there is no certainty as to the outcome of the dispute that is on-going in the Probate OS particularly as to the fate of encl. 12. As such, it is a matter of pure speculation and conjecture that an order will be made for forensic examination of the will and/or that the will may be set aside as being a

forgery and/or the grant of probate dated 5 March 2013 will be set aside. All of this including the issue of intestacy belong presently to the realm of speculation and remains very much "afloat in a sea of uncertainty".

[55] In the meanwhile, the plaintiffs, particularly the second and fourth plaintiffs, who are the lawful sons of the deceased are suffering extreme prejudice as they are being deprived of their just share of the assets of the deceased's estate ie, their late father. I agree that the defendant has no interest as such in the assets of the estate of the deceased and his duty is only to act in accordance with the terms of the will, as modified by the Order dated 11 September 2014.

[56] As such, to allow the defendant to leave the distribution of the assets of the estate of the deceased in prolonged suspended animation whilst he pursues his appeal to the Court of Appeal and at the same time pursues his speculative venture of impugning the signature of the deceased in the will is to my mind, oppressive and unjust to say the least. Having regard to all the circumstances including the delay in the distribution and the prejudice to the beneficiaries, it is my view that the balance of justice lies clearly in favour of the beneficiaries of the estate of the deceased as per the will (as modified by the order dated 11 September 2014).

[57] Indeed, in so far as the nugatory argument is concerned, I take the view that if distribution of the assets takes place as per the order dated 11 September 2014 and it turns out eventually that the will is invalid (for any reason whatsoever) and the grant of probate is set aside and the estate falls into intestacy, then it would not be too difficult to trace the assets and redistribute them pursuant to the rules of distribution as per s. 6(1)(g) of the Distribution Act 1958. It is imperative to keep in mind that the beneficiaries of the estate of the deceased will be none other than the present plaintiffs themselves with the possibility of the estate of the deceased's mother also being a beneficiary in intestacy.

[58] But all of that remains to be seen. Even if by chance the estate of the deceased's mother eventually decides to make a claim under intestacy, then I cannot see how that in itself can be a ground to presently freeze the distribution because of the defendant's adamant stance that distribution should be withheld on account of what he believes to be circumstances which may vitiate the will and by extension the grant of probate dated 5 March 2013.

[59] As I said earlier, and which bears repeating, the defendant is embarking on a speculative venture in order to vitiate the will. This is odd behaviour for an executor whose appointment is derived from the very document which he seeks to impugn. The conduct of the defendant is in the circumstances, unfathomable. The desire to delay is quite apparent and blatant. But, I am not prepared to entertain any other motive as it is improper to determine motive by way of affidavits (See: *Re Smith & Fawcett Ltd* [1942] Ch 304).

[60] Although it is tempting to accede to the notion that the *status quo* should be maintained and that distribution should be withheld pending the materialisation of further events, the present circumstances are such that it would be, as I said earlier, unjust, oppressive and plainly unfair to the beneficiaries if distribution is withheld or delayed any further.

[61] There is just no evidence that if the assets are distributed to the beneficiaries, they cannot be re-traced and recovered in the event the will is later impugned and the grant of probate is set aside. Consequently, there is no justification for the conclusion that it would be difficult and onerous to recover the assets once they are distributed.

[62] Before I conclude, I should add that another dimension to the present circumstances that weighs heavily on my mind is the fact that the Defendant has custody over a cash pile of RM90,000,000 (Ringgit Ninety Million) which represents 95% of the assets of the estate and the question is whether in view of all that has happened to-date, it is safe or appropriate for these monies to remain in the hands of the defendant. As I said earlier, the defendant is clearly "approbating and reprobating" and seeking to delay distribution of the assets whilst at the same time doubting the authenticity of the signature of the deceased in the will and such conduct by the defendant when viewed in its proper perspective erodes the confidence of the court and raises doubts as to whether the assets are safe and should remain in the hands of the defendant. In my view, it would be safer and indeed just and appropriate to allow for distribution to take place as these monies, will after all, be distributed to the lawful sons of the deceased and not to persons who are strangers to the estate.

The Outcome And The Issue Of Costs

[63] In the circumstances, for the reasons as discussed above, I allowed encl. 26 with costs and dismissed encls. 29 and 35, also with costs. Before I made the orders in respect of costs, it was submitted for the plaintiffs that the defendant's conduct was unreasonable and that he should be personally liable for costs. Counsel referred to the following:

(i) *Turner v. Hancock* [1882] 20 Ch D p.303;

(ii) *In Re Beddoe* [1893] 1 Ch p. 547; and

(iii) *Halsbury's Laws of England,* vol 17 4 edn, para. 918.

[64] On the other hand, it was argued for the defendant that he did not gain from the steps that he had taken and that he is not guilty of any unreasonable conduct or misconduct. Counsel for the defendant referred to the following cases to suggest that the defendant should not be made to pay costs personally

(i) *In Re H Somapah, Deceased* [1941] 1 LNS 67; [1946] 12 MLJ (SSR) p. 25

A (ii) *Tan Soo Lock v. Tan Jiak Choo and Another* [1930] 1 LNS 8; [1935] Vol IV MLJ p. 202

The Order

[65] After hearing both sides, I was impelled to the view that the costs in
B relation to encl. 35 should be paid by the defendant personally (not out of the assets of the estate of the deceased) as his conduct was unreasonable. I then made the following orders:

59.1 Order in terms of encl. 26 with costs to be paid by the defendant to the plaintiffs in the sum of RM5,000 (subject to 4% *allocatur*);

C

59.2 Enclosure 29 is dismissed with costs of RM5,000 to be paid by the defendant to the plaintiffs; (subject to 4% *allocatur*);

59.3 Enclosure 35 is dismissed with costs of RM430,000 to be paid "personally" by the defendant to the plaintiffs (subject to 4%
D *allocatur*);

59.4 The defendant's oral application for stay is dismissed;

59.5 I direct that a single order be taken out in respect of all three applications; and

E 59.6 Although the defendant's affidavit affirmed on 28 April 2016 (encl. 53) has not been considered, it is to remain as part of the record, for purposes of inclusion in the record of appeal, if there is an appeal against the orders that were made today.

Order accordingly.

F

G

H

I